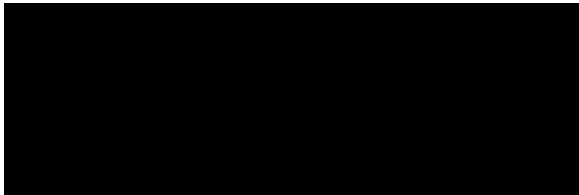


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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



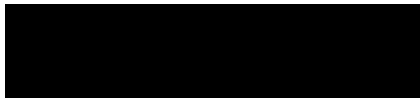
U.S. Citizenship
and Immigration
Services



FILE: EAC-01-227-52298 Office: VERMONT SERVICE CENTER

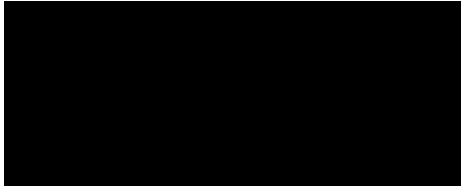
Date: APR 23 2004

IN RE: Petitioner:
Beneficiary:



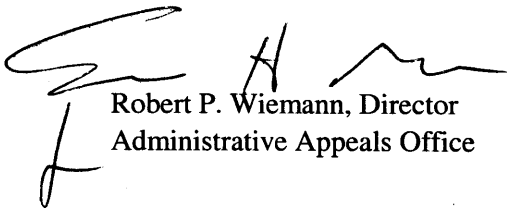
PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

Identifying data deleted to
prevent possible unwarranted
invasion of personal privacy

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DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a business consultation firm. It seeks to employ the beneficiary permanently in the United States as an agricultural data analyst. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who, at the time of petitioning for classification under this paragraph, are professionals.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [CIS].

Eligibility in this matter turns, in part, on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. The petition's priority date in this instance is January 8, 1998. The beneficiary's salary as stated on the labor certification is \$40,580.80 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage and of the beneficiary's qualifications for the job offered. In a request for evidence (RFE) dated September 17, 2001 the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing to the present. The RFE stated that the petitioner's tax return for 1998 showed a taxable income of \$222.00, indicating that the petitioner was not able to pay the proffered wage of \$40,580.80. The RFE also requested additional evidence showing that the beneficiary had the requisite ten years of experience as an agricultural data analysis or in a related position.

The petitioner responded to the RFE with a letter dated October 23, 2001 accompanied by additional evidence consisting of a letter dated October 18, 2001 from a certified public accountant; a letter dated December 15, 1997 from the Regional Research Institute of Agroecology, Michalovce, Slovakia, attesting to the beneficiary's experience with that institute; a certificate dated June 11, 1976 from the Agriculture and Vocational School, Sobrance, Michalovce, Slovakia, attesting to the beneficiary's successful completion of an examination as a gardener-horticulturist; and final examination certificate from the Secondary Agriculture-Technical School, Caklov, Slovakia, attesting to the beneficiary's successful completion of an examination with a major in horticulture-gardening.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date, and denied the petition.

On appeal, counsel submits a brief and additional evidence, consisting of an additional copy of the letter dated October 18, 2001 from a certified public accountant and a letter dated March 13, 2002 from the petitioner's president.

The AAO will first evaluate the decision of the director based on the evidence in the record prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

The director found that the petitioner's Form 1120A, U.S. corporation income tax return for 1998 showed a taxable income of \$222.00. The director found that this income was insufficient to pay the proffered wage as of the January 8, 1998 filing date. The director noted that the evidence included a letter from an accountant attesting to the petitioner's ability to pay the proffered wage as of January 8, 1998 and currently. But the director found that the accountant's letter was not supported by additional probative evidence on that issue. The director also noted that the record lacked any W-2 Wage and Tax Statements to indicate that the beneficiary was employed by and was receiving wages from the petitioner at the time of filing. The director therefore found that the record did not establish the petitioner's ability to pay the proffered wage at the time of filing.

The director's analysis of the petitioner's income tax return for 1998 was correct. That return shows \$222.00 on Line 24, for taxable income before the net operating loss deduction and special deductions. On the returns for other years submitted in evidence the taxable income before the net operating loss deduction and special deductions was -\$6,781 for 1997, \$854 for 1999 and \$23,549 for 2000.

The director did not discuss the petitioner's net current assets for any of the years at issue. Calculations based on the figures in the petitioner's Form 1120-A, Part III, Balance Sheet yield the following amounts for net current assets: \$16,041 for the beginning of 1997, \$9,260 for the end of 1997, \$9,449 for the end of 1998, \$10,175 for the end of 1999, and \$30,192 for the end of 2000.

The above figures for taxable income and for net current assets fail to establish the ability of the petitioner to pay the proffered wage at the priority date or thereafter, since they are all less than the proffered wage.

The letter dated October 18, 2001 from a certified public accountant is a brief two-paragraph letter giving the accountant's opinion that the petitioner "is capable of supporting additional wages of \$40,581 as of January 8, 1998 and currently." The letter states that the accountant's opinion is based on a review of the petitioners "tax returns, financial statements since inception, business plan, and the personal assets of the sole stockholder." But no copies of any of those documents are included with the accountant's letter, nor are any figures taken from those documents included in the accountant's letter. The letter also contains the statement "The company expects to add additional employees to relieve the principals [sic] work duties and allow him to bring on new clients." No further details are given concerning this plan of the petitioner. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Treasure Craft of California*, 14 I&N Dec. 1990 (Reg. Comm. 1972).

The regulation at 8 C.F.R. § 204.5(g)(2), quoted above on page two, lists audited financial statements among the types of acceptable evidence to establish a petitioner's ability to pay the proffered wage. But nothing in that regulation allows for opinion letters of accountants as acceptable evidence. Since the letter dated October 18, 2001 from an accountant lacks supporting documentation showing the basis for the accountant's opinion, the director was correct in not relying on the accountant's letter as evidence of the petitioner's ability to pay the proffered wage.

The director was also correct in finding that no evidence indicated that the beneficiary was employed by and was receiving wages from the petitioner as of the priority date.

For the above reasons, the director was correct, based on the evidence then in the record, in finding that the petitioner had failed to establish its ability to pay the proffered wage as of the priority date and therefore in denying the petition.

On appeal the petitioner submits one document into evidence for the first time – a letter dated March 13, 2002 from the president of the petitioner. The letter states that the president is the sole owner of the corporation and that amounts shown on the petitioner's tax returns for compensation of officers represent payments to himself by the petitioner. The president states that over the past twelve years his compensation has averaged \$79,500 per year. The president states that one reason he has directed the petitioner to make those payments to himself has been to minimize overall taxes. The president further states that he was and is willing to forego his compensation as an officer in order to ensure provision for the proffered salary for the beneficiary.

The letter from the petitioner's president is dated after the date of the director's decision, but counsel makes no claim that the information in the president's letter was unavailable previously, nor is any explanation offered for the failure to submit this evidence prior to the decision of the district director.

The question of evidence submitted for the first time on appeal is discussed in *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988), where the BIA stated:

Where . . . the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose. Rather, we will adjudicate the appeal based on the record of proceedings before the district or Regional Service Center director.

In the instant case, the evidence submitted on appeal relates to the petitioner's ability to pay the proffered wage. The petitioner was put on notice of the need for evidence on this issue by the regulation at 8 C.F.R. § 204.5(g)(2) which is quoted on page two above.

In addition to the regulation, the petitioner was put on notice of the types of evidence needed to establish its ability to pay the proffered wage by published decisions of the Administrative Appeals Office and its predecessor agencies, including *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Moreover, in the instant case, the petitioner was put on notice by the director in the RFE dated September 17, 2001 that the evidence which it submitted with its I-140 petition was insufficient concerning the petitioner's ability to pay the proffered wage. The RFE specifically mentioned that the tax return for 1998, which was then already in evidence, did not establish the petitioner's ability to pay the proffered wage as of the January 8, 1998 priority date. The RFE was sufficiently detailed to put the petitioner on notice of the types of evidence needed to establish the petitioner's ability to pay the proffered wage.

The petitioner therefore was given reasonable notice by regulation, by case law, and by the RFE in the instant case of the need for evidence concerning the petitioner's ability to pay the proffered wage. Yet the petitioner failed to submit the needed evidence prior to the decision of the director or to offer any explanation for its failure to do so. For these reasons, the evidence submitted on that issue for the first time on appeal will not be considered for any purpose.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.